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*Practice Group(s):*  
*Franchising*  
*Corporate*

## Fairness in Franchising Report: Key Recommendations and Potential Implications

### The Parliamentary Joint Committee on Corporations and Financial Services Fairness in Franchising Report

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#### 1. Proposed Regulatory Reform of the Franchising Industry

On 14 March 2019, the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) released the Fairness in Franchising Report (**Report**), following their inquiry into the Operation and Effectiveness of the Franchising Code of Conduct (**Inquiry**). In the Report, the Committee proposes extensive reform of the franchising industry, including numerous proposed amendments to the *Franchising Code of Conduct (Cth)* (**Franchising Code**) as well as increased regulator responsibilities and powers.

At this stage, it is not clear which recommendations will be implemented or the expected time frame for implementation. Notwithstanding, it is critical that franchisors understand the key potential compliance challenges and consider taking a proactive approach in preparation for the anticipated changes to the Franchising Code. This update provides a brief explanation of several key recommendations and their potential implications and proposes priorities for consideration in anticipation of the proposed reforms.

#### 2. Key Proposed Reforms

##### *2.1 Key Recommendations for Examination by the Franchising Taskforce and Potential Implications*

The Committee has recommended that the Australian Government establish a Franchising Taskforce (**Taskforce**) to examine the feasibility and implementation of some of the key recommendations, which have a number of potential implications for franchisors (Table 1). Importantly, these recommendations have been directed to the Taskforce for its consideration. It therefore remains to be seen which recommendations will ultimately be adopted or what the expected time frame for the implementation of the selected recommendations, if any, would be.

## Fairness in Franchising Report: Key Recommendations and Potential Implications

Table 1: Key Recommendations for consideration by the Taskforce and Potential Implications

Recommendation Number	Recommendations Summary	Potential Implications
6.14	<p><b><u>Public Franchise Register</u></b></p> <p>The Taskforce investigate options for a public franchise register with franchisors providing updated disclosure documents and template franchise agreements annually in compliance with the Franchising Code, including whether the Australian Competition and Consumer Commission (ACCC) should operate the register and application of civil penalties for non-compliance.</p>	<p>This recommendation would result in an increased compliance burden for franchisors. If the information is publicly available, this would have a number of significant implications for franchisors including accessibility of information by competitors and exposure to risks regarding unfair contract terms in a franchise agreement.</p> <p>Civil penalties for non-compliance could apply.</p>
7.1	<p><b><u>Third Line Forcing</u></b></p> <p>The Taskforce examine how to amend the Franchising Code to provide that franchisors are required to include within the disclosure document to franchisees for the two year period prior to the franchisee entering the franchise:</p> <ul style="list-style-type: none"> <li>• where the maximum resale price of each item has been below the cost price of the product purchased by the franchisee. This includes, but is not limited to, the cost of the product inclusive of any fees associated with the purchase of the product, royalties, other fees and fixed and variable costs in relation to the purchase and sale of the product have added; and</li> <li>• the margin between the purchase price paid by the franchisee and the maximum price or recommended resale price of the top five by volume of goods and services sold by the franchisee; and</li> <li>• if data is not available for that particular franchise, then data for a comparable franchise needs to be provided.</li> </ul>	<p>The recommendations aim to address concerns relating to excessive stock purchasing, inflation and the taking of royalties from franchisee top line sales by providing prospective franchisees with a better financial understanding of the franchise business model. This includes use of a 'loss leader strategy' and making further inquiry into franchisor discretion relating to supply order volume and frequency.</p> <p>The proposed new disclosure obligations are potentially onerous and raise several compliance concerns. Specifically in relation to a franchisor's ability to obtain accurate information or where there is inconsistency between different calculation methods used. The proposal that data for comparable franchises be used creates potential practical difficulties. These include calculation methods, absence of data or inaccurate data and whether this will require the use of experts. There are also concerns regarding the commercially sensitive nature of the information which could ultimately be included in a public register.</p>
7.2	<p>The Taskforce consider whether the ACCC should conduct an inquiry into all terms of franchise agreements relating to the discretion of the franchisor to decide the volume and frequency of supply orders for goods and services to be sold in the franchised business to prevent exploitative behaviour around over-ordering.</p>	
8.2	<p><b><u>Supplier Rebates</u></b></p> <p>The Taskforce consider amendments to item 10 of the Franchising Code to require the franchisor to detail in percentage terms what proportion of the supplier rebate will be:</p> <ul style="list-style-type: none"> <li>• retained by the franchisor; and</li> <li>• directed to franchisees, including indirectly, through: <ul style="list-style-type: none"> <li>- direct payment to franchisees;</li> <li>- free or subsidised training; or</li> <li>- advertising and marketing; or</li> <li>- subsidised goods and services; or</li> <li>- administration expenses.</li> </ul> </li> </ul>	<p>These recommendations significantly broaden franchisor disclosure obligations in relation to supplier rebates. A number of difficulties in practice could arise, particularly when calculating percentages for complicated rebate arrangements.</p> <p>The recommendation in relation to conflicts of interest is particularly significant because this suggests a possible extension of the current law to effectively create a fiduciary duty between franchisors and franchisees extending beyond good faith obligations, which could lead to increased liability and risks for franchisors.</p>

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Recommendation Number	Recommendations Summary	Potential Implications
8.3	<p>The Taskforce conduct an investigation to examine conflicts of interest associated with supplier rebates and third line forcing, including:</p> <ul style="list-style-type: none"> <li>the extent to which tender processes for suppliers conducted by franchisors are influenced by rebates or other benefits provided back to franchisors;</li> <li>the nature and extent of rebates or benefits that flow from suppliers to franchisors;</li> <li>the extent to which those rebates or benefits coincide with the use of third line forcing;</li> <li>the extent to which those rebates or benefits may be conflicted remuneration;</li> <li>the extent of the detriment suffered by franchisees as a result of such rebates or benefits;</li> <li>whether any of the rebates or benefits (including any associated third line forcing) are in breach of the Franchising Code or competition laws;</li> <li>whether, and if so, the extent to which rebates or benefits are passed through to and provide a benefit to franchisees; and</li> <li>making recommendations for policy or regulatory change to address any problems that are identified.</li> </ul>	
8.4	<p>The Taskforce consider amendments to items 7 and 10 of the Franchising Code to provide that if the master franchisor controls and/or receives rebates from suppliers, this is disclosed in the franchise disclosure statement.</p>	
9.1	<p><b><u>Unfair Contract Terms</u></b></p> <p>The Taskforce examine the appropriateness of amending section 23 of the <i>Australian Consumer Law (ACL)</i> to provide that:</p> <ul style="list-style-type: none"> <li>unfair contract terms contained in small business contracts and franchise agreements are prohibited; and</li> <li>civil pecuniary penalties and infringement notices apply where the provision of a standard form contract (franchise agreement) to a small business contains an unfair contract term.</li> </ul>	<p>The recommendations significantly broaden the current unfair contract terms (<b>UCT</b>) regulatory regime and the options available to challenge an unfair contract term. The current regime is limited to small businesses and can have limited applicability due to the application of the Franchising Code or class exemptions. Currently, inclusion of an unfair contract term in a franchise agreement is not illegal per se under the ACL nor is there a penalty attached and, to challenge a potential unfair contract term, the franchisee or the regulator must pursue court action.</p>
9.5	<p>The Taskforce examine the appropriateness of amending the Franchising Code to require compliance with the UCT regulatory regime.</p> <p>The Taskforce examine how to amend section 23 of Schedule 2 of the ACL to provide that unfair contract terms provisions apply to all franchise agreements notwithstanding any other term in the franchise agreement or other agreements.</p>	<p>If this recommendation is implemented in conjunction with the recommendation concerning the establishment of a franchise register that is publicly available, franchisors would be exposed to greater scrutiny and subject to increased liability risks.</p>
9.6	<p>The Taskforce consider options to address the existence of unfair contract terms in perpetual franchise agreements.</p>	

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Recommendation Number	Recommendations Summary	Potential Implications
9.8	<p><b><u>Unilateral Variation</u></b></p> <p>The Taskforce consider whether the Franchising Code should place restrictions (including whether such amendments can only be made with the agreement of the majority of franchisees, or representatives elected by a majority of franchisees, within the same franchise system) on franchise agreements providing for what would otherwise be unilateral variation to subsidiary requirements to franchise agreements, such as franchise manuals or policies.</p>	<p>This recommendation places restrictions on franchisor discretion to unilaterally amend subsidiary requirements to franchise agreements, such as operations manuals. Such amendments would only be able to be made with the agreement of the majority of franchisees or representatives elected by a majority of franchisees. This recommendation has the potential to significantly reduce the flexibility currently experienced by franchisors to unilaterally update their franchise systems from time to time.</p>
9.2	<p><b><u>Investigations Power</u></b></p> <p>The Taskforce consider amendments to the <i>Competition and Consumer Act 2010 (Cth)</i> to ensure section 155 notices are available to allow the ACCC to obtain evidence about whether a standard form contract contains an unfair contract term.</p>	<p>This recommendation increases scrutiny of the use of unfair contract terms in franchise agreements.</p>
5.1	<p><b><u>Franchisee Representation</u></b></p> <p>The Taskforce examine how consultative processes associated with franchising policy, regulation and legislation can achieve an appropriate level of input from franchisees, including the appropriateness of a franchisee representative becoming a voting member of the franchisor's board.</p>	<p>This recommendation significantly increases franchisee representation in the franchise industry, which would have a number of implications for franchisors. In particular, this may impact effective corporate governance and create some issues for multinational franchise chains (for example).</p>
11.2	<p><b><u>Termination Rights</u></b></p> <p>The Taskforce consider how to amend the Franchising Code to include provision for a franchisee to have a right to terminate the franchise agreement in special circumstances (similar to clause 29), for example, if a liquidator is appointed to the franchisor (or where the franchisor is a natural person, becomes bankrupt).</p>	<p>This recommendation contemplates that franchisees would have statutory termination rights in special circumstances, significantly broadening the current framework set out in clause 29 of the Franchising Code. These changes could create uncertainty for both franchisors and franchisees and the recommendation is inconsistent with the recent insolvency law reforms relating to ipso facto clauses.</p>
12.1	<p><b><u>Goodwill</u></b></p> <p>The Taskforce examine whether the Franchising Code be amended to include a requirement for franchise agreements and transfer contracts to set out the end of term arrangements for franchisee goodwill including:</p> <ul style="list-style-type: none"> <li>• what financial consideration the franchisee is entitled to (if any) when a franchise agreement expires and the agreement is not renewed, including: <ul style="list-style-type: none"> <li>- if the franchise is closed down; or</li> <li>- if the franchise becomes a corporate store; or</li> <li>- if the franchise is sold by the franchisor to another party; and</li> </ul> </li> <li>• what financial consideration the franchisee is entitled to (if any) when a lease between a franchisor and the landlord upon which the franchise is dependent upon is not renewed; and</li> <li>• how the franchise goodwill is calculated and determined separately from the site and brand goodwill.</li> </ul>	<p>This recommendation is intended to increase transparency around the calculation and attribution of goodwill. Pursuant to this recommendation, franchise agreements would need to specify in the end-of-term arrangements whether a franchisee is entitled to any goodwill, including where no goodwill is attributable and how goodwill will be calculated.</p> <p>This could result in practical difficulties for franchisors relating to determining the value of goodwill. It could also have significant implications for the franchisee/franchisor relationship by creating an expectation of goodwill entitlements on the part of franchisees.</p>

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Recommendation Number	Recommendations Summary	Potential Implications
12.2	The Taskforce examine how to implement the collection and analysis of data on franchisee transfers and re-examine whether policy and regulatory settings are appropriate.	
16.1	<p><b>Civil Penalties</b></p> <p>The Taskforce examine amendments to the <i>Competition and Consumer Act 2010 (Cth)</i> (<b>CC Act</b>) including civil pecuniary penalties and quantum of penalties available for breaches of the Franchising Code and prescribing penalties for a breach of the Franchising Code in legislation to avoid limits under subsection 51AE(2).</p>	This recommendation contemplates civil penalties for all breaches of the Franchising Code in excess of 300 penalty units to reflect maximum penalties under the ACL.
21.1	<p><b>Capital Expenditure</b></p> <p>The Taskforce examine how clause 30 of the Franchising Code could be amended, including to:</p> <ul style="list-style-type: none"> <li>• clearly define 'significant capital expenditure'; and</li> <li>• constrain franchisors ability to impose capital expenditure requirements on franchisees to ensure that franchisees: <ul style="list-style-type: none"> <li>- are able to make an appropriate return on investment within the remaining franchise agreement, lease or license terms; or</li> <li>- only have to pay for a pro-rata portion of the capital expenditure that would allow an appropriate return on investment within the franchise, lease or license terms, with the franchisor to fund the rest of the capital expenditure; or</li> <li>- are paid appropriate compensation by the franchisor if the franchisor subsequently terminates the franchise agreement.</li> </ul> </li> </ul>	<p>This recommendation is intended to increase clarity regarding what constitutes 'significant capital expenditure' and the ability of franchisors to impose capital expenditure requirements on franchisees.</p> <p>This recommendation has a number of implications for franchisors, particularly the potential imposition of any new requirement to ensure that franchisees make an 'appropriate' return on investment. Further, imposing such obligations could lead to practical difficulties in determining what an 'appropriate' return on investment might be, the pro-rata portions of capital expenditure required to allow an 'appropriate' return on investment and what amounts to 'appropriate' compensation in the event of franchisor termination.</p>
21.2	The Taskforce consider updating item 18 of Annexure 1 of the Franchising Code to reflect changes to Clause 30.	
21.3	Direct recommendation to the Australian Government to amend the Franchising Code to explain amended clause 30.	
22.1	<p><b>Capital</b></p> <p>The Taskforce examine the extent to which franchise systems and their agreements involve co-investments and risk sharing in an enterprise such that they should be regulated similarly to financial products under the <i>Corporations Act 2001 (Cth)</i> (<b>Corporations Act</b>).</p>	This recommendation increases scrutiny of, and potential limitations on, the extent to which franchisees can be used as a source of capital by a franchisor. This recommendation raises questions as to the appropriateness of dual regulation under both the Franchising Code and the Corporations Act, particularly in the event of inconsistency and given the associated compliance costs.
20.1	<p><b>Retail Lease Arrangements</b></p> <p>The Taskforce examine the appropriateness of amending clause 13 of the Franchising Code, including to provide that:</p> <ul style="list-style-type: none"> <li>• the franchisor must provide leasing information alongside the disclosure document and franchise agreement;</li> </ul>	These recommendations broaden franchisor disclosure obligations to require that franchisees are provided with leasing information 14 days prior to the signing of the franchise agreement and that the franchise agreement remains conditional if:

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Recommendation Number	Recommendations Summary	Potential Implications
	<ul style="list-style-type: none"> <li>• the franchisor must, upon request by a franchisee or prospective franchisee, provide the head lessor disclosure statement that is currently in effect within 7 days of the request;                             <ul style="list-style-type: none"> <li>- a franchisee may terminate without penalty the franchise agreement and any agreement to the sub-lease of a premises by providing written notice to the franchisor within six months of the franchisee occupying the premises if: the franchisor does not comply with the obligation to provide a head lessor disclosure statement; or</li> <li>- a head lessor disclosure statement when given to a franchisee is:                                     <ul style="list-style-type: none"> <li>o materially incomplete; or</li> <li>o omits information, including key financial information; or</li> <li>o contains false or misleading information;</li> </ul> </li> </ul> </li> <li>• and the franchisee is in a substantially worse position than the franchisee would be if the head lessor disclosure statement were not subject to the above.</li> </ul>	<p>a site is required for the operation of the franchise agreement; and</p> <p>a location has not been identified or finalised prior to the signing of the franchise agreement.</p> <p>The recommendations also permit franchisees to terminate agreements to sub-let or occupy a premises provided by the franchisor as head lessee in certain circumstances, including for failure to provide accurate and comprehensive head lessor disclosure statement. This recommendation could have significant implications for franchisors, particularly if such a change to the Franchising Code was to have retrospective effect. The recommendations highlight the importance of synchronising the term of a lease of franchised premises with the term of the franchise agreement as much as is feasible.</p>

### 2.2 Key Recommendations for Direct Implementation and Potential Implications

The Committee has recommended the Australian Government directly implement a number of amendments to the Franchising Code and the CC Act. This section lists a number of the key proposed recommendations and their potential implications (Table 2).

Table 2: Recommendations Relating to Unilateral and Retrospective Variation of Franchise Agreements

Recommendation Number	Recommendations Summary	Potential Implications
16.2 (in part)	<p><b><u>Unilateral and Retrospective Variation of Terms and Conditions</u></b></p> <p>Amend the Franchising Code to include:</p> <ul style="list-style-type: none"> <li>• a ban on unilateral variations to terms and conditions; and</li> <li>• a ban on retrospective variations to terms and conditions.</li> </ul>	<p>These recommendations would curtail the flexibility to make unilateral variations to franchise systems.</p>
9.7	<p><b><u>Franchise Agreement</u></b></p> <p>Amend the Franchising Code to require that where any franchise agreement provides for what would otherwise be unilateral variation to the terms of the agreement. Such amendment can only be made with the agreement of the majority of franchisees within the same franchise system or representatives elected by a majority of franchisees within the same franchise system.</p>	<p>Under this recommendation, unilateral variation to the terms of a franchise agreement would require agreement of the majority of franchisees within the same franchise system or representatives elected by a majority of franchisees within the same franchise system. Again, this would result in less flexibility for franchisors to make changes to their franchise systems.</p>

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### Exit Arrangements

The key proposed amendments to the Franchising Code in relation to exit arrangements and their potential implications are detailed in Table 3.

Table 3: Key Recommendations Relating to Exit Arrangements

Recommendation Number	Recommendations Summary	Potential Implications
11.1	<p>Amend the Franchising Code to include provisions for Franchisee triggered no-fault exit from franchise agreements where:</p> <ul style="list-style-type: none"> <li>• the franchisee is over-gearred or is suffering personal hardship;</li> <li>• franchisor exploitation leads to franchisee loss of profit; and</li> <li>• business failure.</li> </ul>	<p>This recommendation has a number of practical implications, including:</p> <p><b>Over-gearred or personal hardship</b></p> <ul style="list-style-type: none"> <li>• franchisee can trigger early exit with protection from buy-back exploitation; and</li> <li>• a cap on franchisor claims for damages.</li> </ul> <p><b>Franchisor exploitation</b></p> <ul style="list-style-type: none"> <li>• franchisee can trigger early exit after 9 months;</li> <li>• franchisor responsible for lease exit terms; and</li> <li>• franchisors required to pay a pro-rata portion of upfront fees to the franchisee.</li> </ul> <p><b>Business failure</b></p> <ul style="list-style-type: none"> <li>• lease termination costs are shared; and</li> <li>• no requirement to perform franchise agreement terms.</li> </ul> <p>This recommendation would have significant implications for the franchise sector if implemented, and query whether it is appropriate for franchisees to be in a different position in terms of risk allocation to other small business operators.</p>
11.4	<p>Amend the Franchising Code to require that for termination in special circumstances the franchisor must provide seven days' notice and if the franchisee lodges a notice of dispute with a mediator, arbitrator or court during the seven days, the termination process must be suspended until the dispute is resolved. Civil penalties for non-compliance.</p>	<p>This recommendation proposes a seven day notice period for termination in special circumstances, during which the franchisee can lodge a notice of dispute and the termination process must be held back until resolved through dispute resolution processes. This recommendation creates the potential for inconsistent legal obligations being placed on certain kinds of franchisors in relation to immediate termination events, such as unlawful operation of a business in the event of fraud.</p>
11.5	<p>Amend the Franchising Code such that:</p> <ul style="list-style-type: none"> <li>• termination in relation to fraud can only occur if the franchisee is convicted of fraud in connection with the operation of the franchise; and</li> <li>• termination in relation to public health and safety can only occur if the franchisee is served with a 'permanent closure direction' for the franchise by a relevant government body, or failure to remedy Workplace Health and Safety (WHS) orders or notices.</li> </ul>	<p>This recommendation limits franchisor discretion for termination in relation to fraud and endangering public health and safety under paragraphs 29 (1) (f) and 29 (1) (g), which must be determined by a relevant government authority.</p>

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### Disclosure Obligations

The key proposed amendments to the Franchising Code in relation to disclosure obligations and their potential implications are detailed in Table 4.

Table 4: Key Recommendations Relating to Disclosure Obligations

Recommendation Number	Recommendations Summary	Potential Implications
6.1	The disclosure document and franchise agreement must be made available in both electronic and hardcopy form.	The Committee has focused on practical changes aimed at improving the simplicity, accuracy and availability of information to franchisees. The Committee is of the view that due diligence would be greatly assisted through the provision of electronic documents to the franchisee or prospective franchisee. One submission also notes that the provision of an electronic copy of the franchise agreement may improve the ability of franchisees to obtain legal advice. This recommendation could result in problems arising from the provision of duplicate documents and could lead to increased costs for franchisors. It also raises questions regarding the absence of choice as to the preferred form of these documents.
6.2	Franchisors must provide the information statement set out in Annexure 2 to franchisees as a separate document that is also subject to the disclosure and cooling off provisions, and not as an attachment to the Franchising Code.	Annexure 2 (Information statement for prospective franchisees) would be provided to franchisees as a separate document that is subject to the disclosure and cooling off provisions, not merely as an attachment to the copy of the Franchising Code.
6.9	<p><b><u>Marketing Fees and Funds</u></b></p> <p>Amend clause 15 of the Franchising Code to provide that the actual financial statements for the marketing fund account be provided to franchisees within 30 days of the end of each quarter with sufficient detail as to be prescribed in the Franchising Code and relevant standards set by the Australian Accounting Standards Board.</p>	This recommendation aims to increase transparency regarding the appropriate use of marketing funds as well as greater accountability around franchisor contributions and expenses. The Committee does acknowledge potential confidentiality issues, although finds them outweighed by the protective effect of the recommendations for franchisees. This could lead to increased costs for franchisors who are operating marketing funds.
6.3	<p>Amend the Franchising Code to provide that:</p> <ul style="list-style-type: none"> <li>• the vendor franchisee or franchisor must provide the prior two years' Business Activity Statements, a profit and loss (income) statement and balance sheets (statement of financial position) and an assessment of labour costs for that particular franchise business to the prospective franchisee, or franchisor if the vendor franchisee is closing or selling back to the franchisor, in the disclosure document or attached to the disclosure document; or</li> <li>• if the franchise is a greenfield franchise, then the franchisor must provide the prospective franchisee the Business Activity Statements, profit and loss statements and balance sheets for the two year period of a comparable franchise to the prospective franchisee in the disclosure document or attached to the disclosure document.</li> </ul>	This recommendation addresses the Committee's concerns that providing earnings information and other financial information separately to the disclosure document avoids compliance obligations under the Franchising Code. The recommendation gives rise to concerns around potential liability for franchisors that may unintentionally provide prospective franchisees with inaccurate or misleading earnings information, including where such information is obtained from prior franchisees and passed on without knowledge of any inaccuracy.



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Recommendation Number	Recommendations Summary	Potential Implications
6.4	All financial information relating to the franchise business must not be provided to the franchisee separately to the disclosure document (that is, it must be provided in or attached to the disclosure document).	
6.5	The franchise disclosure document concerning financial statements should include a statement pertaining to accuracy, correctness and compliance with the Franchising Code and the Australian Accounting Standards Board.	

### Supplier Rebates

The proposed amendment to the Franchising Code in relation to supplier rebates and potential implications which could arise are detailed in Table 5.

Table 5: Recommendation Relating to Supplier Rebates

Recommendation Number	Recommendations Summary	Potential Implications
8.1	Amend the Franchising Code so that all supplier rebates, commissions and other payments in relation to the supply of goods and services to franchisees by the franchisor or suppliers mandated by the franchisor be disclosed as a percentage of the full purchase price on each transaction.	The current disclosure obligations only require franchisors to disclose to prospective franchisees whether they receive a supplier rebate, not the rebate amounts applied on top of the wholesale price for goods and services that they purchase. The Committee considers greater disclosure imperative to allow franchisees to conduct a complete assessment of the expenses of the franchise opportunity, despite risks that this disclosure could increase the risk of compromising the competitive advantage of a franchisor. However, franchisors could face practical difficulties in determining rebate calculations in order to make meaningful disclosure in this regard.

### Collective Action

The key proposed amendments to CC Act in relation to collective action and their potential implications are detailed in Table 6.

Table 6: Key Recommendations in Relation to Collective Action

Recommendation Number	Recommendations Summary	Potential Implications
14.1	Implement the ACCC's proposal for a class exemption to make it lawful for franchisees to collectively bargain with their franchisor regardless of size or other characteristics.	Removes uncertainty regarding the lawfulness of franchisee participation in collective bargaining under the CC Act. This recommendation could potentially lead to extensive franchisee collective bargaining with franchisors if franchisees elect to collectively negotiate.
14.2	The ACCC conduct an investigation into whether franchisors have taken action to impede franchisees who have attempted to pursue issues collectively, and to take action based on the findings of this investigation, as appropriate.	

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### Whistleblower Protections

The proposed recommendation in relation to whistleblower protections and the potential implications which could arise are detailed in Table 7.

Table 7: Recommendation in Relating to Whistleblower Protection

Recommendation Number	Recommendations Summary	Potential Implications
3.1	The whistleblower protection regime recommended in the Committee's 'Whistleblower Protections' Report of September 2017 should apply to franchisees and their employees and breaches of the Franchising Code included as 'disclosable conduct'.	This recommendation permits franchisees to report allegations of franchisor misconduct to a regulator, who will investigate. Franchisees will have protection from retaliation. This recommendation raises questions relating to the extent to which this would impact legitimate termination rights, particularly in special circumstances.

### Penalties

The key proposed amendments in relation to penalties and their potential implications are detailed in Table 8.

Table 8: Key Recommendations Relating to Penalties

Recommended Amendments	Legislation/Regulation to be Amended	Recommendation Number	Recommendation Summary and Potential Implications
Franchisor termination in special circumstances	Franchising Code Clause 29	11.4 (in part)	Action by a franchisor in furtherance of a non-compliant notice (with insufficient notice) should attract a civil penalty of a similar amount to other penalties associated with such further action or termination. This recommendation could result in additional risks for franchisors when exercising discretion to terminate in special circumstances.
Investigation power	CC Act Section 51ADD	6.15	Civil pecuniary penalties should apply for non-compliance with a section 51ADD notice within 21 days after notice. Currently, the only recourse available to the ACCC is to apply for a court order.
Prohibition on passing on legal costs to franchisees	Franchising Code	16.2 (in-part)	Except where already incorporated into a joining fee, a prohibition on passing on to the prospective franchisee the legal costs of preparing, negotiating and executing documents. This includes a civil penalty for any franchisor found to be deliberately attempting to increase franchise fees to circumvent a regulation to prevent the passing on of legal costs. This recommendation would impact the setting of franchise fees and, depending on specific drafting, could result in costs incurred as a result of proving the legality of fee setting arrangements.
Marketing and advertising fees	Franchising Code clause 31	6.8	Civil pecuniary penalties would apply for breach of clause 31.

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### *Restraint of Trade*

The proposed amendments of the Franchising Code in relation to restraint of trade and their potential implications are detailed in Table 9.

Table 9: Proposed Amendments in Relation to Restraint of Trade

Recommendation Number	Recommendations Summary	Potential Implications
13.1	The ACCC (or another agency as appropriate) commission a review of clause 23 of the Franchising Code to determine whether it is fit for purpose and whether any changes are required.	The review could result in amendments to clause 23 which offer greater protection to franchisees, particularly in relation to whether it provides a remedy for unfair contract terms and whether it unfairly impacts franchisees due to the onus of proof. This could limit the ability to enforce restraint of trade obligations and could have wider impact on other franchisees in chains affected by former franchisees choosing to compete against their former franchise system.
13.2	Amend the Franchising Code to incorporate into the disclosure document an explanation that clauses (or part thereof) of a franchise agreement that are not in compliance with clause 23 of the Franchising Code are of no effect and not enforceable by the franchisor.	This recommendation will increase transparency for franchisees regarding the circumstances in which they are bound by restraints of trade and the circumstances in which they can challenge those restraints in court.
13.3	Amend the Franchising Code to: <ul style="list-style-type: none"> <li>clarify what constitutes a 'breach' for the purposes of paragraph 23(1)(b) with particular regard to the concept of a 'related agreement' within the clause; and</li> <li>insert 'at the time of expiry' at the beginning of paragraph 23(1)(b).</li> </ul>	This recommendation aims to improve clarity for franchisees regarding what constitutes a 'breach', particularly whether it requires a serious breach or a minor breach and the application of restraint of trade exemptions relating to the obligation to remedy breaches outstanding at the expiry of the franchise agreement.

### *Regulator Responsibilities and Powers*

The key proposed amendments in relation to regulator responsibilities and powers and their potential implications are detailed in Table 10.

Table 10: Key Recommendations Relating to Regulator Responsibilities and Powers

Recommendation Number	Recommendations Summary	Potential Implications
4.1	The ACCC be given power to intervene and prevent the marketing and sales of franchises where a franchisor shows a track record of churning and/or burning.	The ACCC will target systematic 'churning' and 'burning' behaviour by franchisors. During an investigation, the ACCC can intervene to prevent franchisors from marketing and selling such franchises. This would be similar to the proposed product intervention powers currently before Parliament.
9.3	The Australian Government resource the ACCC to enable it to appropriately investigate all complaints or whistleblower reports about illegal unfair contract terms.	This recommendation will lead to significantly increased scrutiny of the franchising sector. In particular, franchisees can report allegations of potentially unfair contract terms which the ACCC can investigate without recourse to a court order.

## Fairness in Franchising Report: Key Recommendations and Potential Implications

### Priorities for Immediate Action

Although at this stage it is not clear which recommendations will be implemented, or the expected timeframe for implementation, franchisors should consider taking action in preparation for the anticipated changes (Table 11).

Table 11: Priorities for Consideration by Franchisors

Franchisors should:

- review franchise agreements for potentially unfair contract terms and unilateral variation clauses as these recommendations are central and are likely to be implemented in some form;
- take steps to prepare for the potential requirement to compile financial information; and
- ensure the availability, comprehensiveness and accuracy of head lessor disclosure statements and final lease agreements to avoid enlivening proposed franchisee triggered termination or attracting civil penalties.

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